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IN THE

Supreme Court of the United States

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No. 7 Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

EXCEPTIONS OF DEFENDANT, THE STATE OF WYOMING, TO THE REPORT OF MICHAEL J. DOHERTY, SPECIAL MASTER.

LOUIS J. O'MARR,
Attorney General.

W. J. WEHRLI,
Special Counsel.

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In these Exceptions, reference is made to the Master's Report by designation "M.R." followed by the appropriate page numbers, and references to the Exhibits introduced by Nebraska, Wyoming, Colorado and the United States by the letters "N", "W", "C" and "U.S." followed by the number of the particular exhibit.

While the subject matter of the Exceptions can not be completely segregated under different topics, certain headings will be inserted which may be helpful in correlating the Exceptions with the Report.

HISTORY AND EXTENT OF IRRIGATION

I

Wyoming excepts to the statement of the Master at page 28 of his Report, that the oldest priority in Wyoming is November 1, 1882, since it is disclosed by N-93 that the oldest Wyoming right has priority of 1866, and since the evidence discloses that total Wyoming appropriations prior to September 10, 1882, the date of the earliest Nebraska right, comprise 282 second feet on the North Platte and tributaries, exclusive of the Laramie River and Horse Creek; 631 second feet on the Laramie and 321 on Horse Creek. The total of these rights ante-dating the earliest Nebraska priority of September 10, 1882, on the North Platte and all tributaries, excluding the Laramie, is 603 second feet covering 42,210 acres, and with the Laramie 1,234 second feet for 86,380 acres.

COLORADO-WYOMING STATE LINE TO PATHFINDER RESERVOIR

II

This Defendant excepts to the finding and conclusion of the Master at page 48 of the Report that 56 per cent of the acreage covered by adjudicated water rights above Pathfinder Reservoir in Wyoming, has rights senior to December 6, 1904, and 44 per cent junior to that date, for the reason that these percentage values are erroneous. Based upon the Master's determination of 272,000 acres within adjudicated rights, of which 162,000 acres have rights senior to December 6, 1904, and 110,000 acres junior, the percentage relationship is 60 per cent senior to December 6, 1904, and 40 per cent junior to that date.

This Defendant excepts to the division in second feet of acreage above Pathfinder Reservoir in Wyoming senior and junior to December 6, 1904, disclosed at page 48 of the Report as being 3,885 second feet under the senior rights and 1,501 second feet under the junior, for the reason that the total rights, as disclosed at page 48 of the Report, comprise only 3,885 second feet, of which, as above explained, 60 per cent are senior to December 6, 1904, or 2,331 second feet, and 40 per cent junior, or 1,554 second feet.

III

This Defendant excepts to the estimate made by the Master at page 49 of the Report, that 35 per cent of the total con-

sumption above Pathfinder in Wyoming is by rights junior to December 6, 1904, and with reference thereto says that the total consumption by such junior rights does not exceed 20 per cent of the total use in the area, amounting to only 30,000 acre feet instead of 52,290 acre feet as estimated in the report.

CLAIMED "OUT-OF-PRIORITY" DIVERSIONS AND CLAIMED DAMAGE TO NEBRASKA

IV

This defendant excepts to any finding or conclusion of the Master, or any indication thereof, which may be found in his Report to the effect that Wyoming at any time, or upon any theory, used or appropriated any water to which the State of Nebraska was entitled, or for which said State, or her appropriators, had need or beneficial use, and in this respect exception is taken to the following statement:

> "On the other hand if priorities are to control then both Colorado and Wyoming have during the period overpassed their limits for they have taken water in substantial quantities which on an interstate priority basis would have gone to Nebraska." (Master's Report, p. 8.)

Wyoming excepts to this statement for the reason that it wholly ignores the question of whether or not any water diverted in Wyoming was needed at the time of such diversion in the State of Nebraska, and whether such water, if not diverted in Wyoming, would have reached any appropriator in the State of Nebraska at the time of need therefor.

Further, in this connection, this Defendant points out that the Master has found that lands supplied by diversions below the Tri-State dam, which is located one mile below the Wyoming—Nebraska state line, have no equitable claim upon Wyoming. (M.R. pp. 9, 92, 103.) The supply in the Whalen Tri-State dam section for the years 1931 to 1940 was adequate to meet the requirements specified by the Master. (M.R. Table III, p. 67.) Therefore, since Nebraska could make no claim to fulfill any requirements below Tri-state dam, and since the supply was adequate to meet requirements in the Whalen Tri-State dam section, there was no shortage upon which Nebraska could found any claim against Wyoming.

With further reference to said Table III at page 67, and the tables showing diversions of the canals in the Whalen Tri-State dam section, at pages 76 to 79 inclusive of the Master's Report, this defendant states that the excesses in supply of years preceding years of deficiency were diverted for Nebraska lands or passed the Tri-State dam into the State of Nebraska, and that it was due to the acts of Nebraska and her appropriators that such surplusses were not conserved by retention in Pathfinder reservoir for use in succeeding years.

V

In connection with the discussion of Nebraska's claims with reference to out-of-priority diversions and damage, appearing at pages 102 to 106 of the Master's Report, Wyoming states that Nebraska did not present any evidence wherein such claimed out-of-priority diversions for any year or series of years were confined to uses made in Wyoming, and that no evidence or study was presented by Nebraska except such as contained alleged out-of-priority diversions made in the State of Wyoming which were diverted to, or used upon, Nebraska lands; particularly the lands of the Mitchell, French, Interstate and Fort Laramie canals. The evidence produced by Nebraska as to claimed out-of-priority diversions also included claimed out-of-priority storage diversions in Pathfinder and Guernsey reservoirs, and this water was stored, in large part, for the benefit and use of Nebraska and her appropriators. Since Nebraska did not present any evidence or any water supply study confined to claimed out-of-priority diversions used solely on Wyoming lands, no finding or conclusion can be made that Wyoming at any time, or upon any theory, diverted any water to which Nebraska was entitled. Especially is this true when the burden is on Complainant to establish its case by clear and convincing evidence. (See M.R. p. 107 and cases there cited.)

REQUIREMENTS OF WHALEN TRI-STATE DAM SECTION

VI

This Defendant excepts to the total May-September requirement of 1,027,000 acre feet, as determined by the Master (M.R. pp. 59 to 61) for diversion from the Whalen Tri-State Dam Section; and also excepts to the requirements specified for the Interstate, Tri-State, Northport and Ramshorn canals for the

reason that the Ramshorn canal should not be included within the section, and for the reason that the aggregate requirement for the section and the individual requirements of the Interstate, Tri-State and Northport are excessive, and in support of these exceptions this Defendant says as follows:

Interstate Canal

The annual requirement of the Pathfinder Irrigation District, comprising Wyoming and Nebraska lands under the Interstate canal, as determined by the Master is 419,000 acre feet (M.R. pp 59, 61, 204-213). This is based upon a combination of "liberal" or maximum values. The current figure of about 98,000 acres (M.R. p. 209) is 3,500 acres in excess of the average of the years 1938 to 1940, which was 94,500 acres. The proposed delivery rate at the land of 1.8 acre feet per acre is admitted by the Master to be on the "liberal side." (M. R. p. 210.) As to the distribution system loss of 58 per cent adopted by the Master, he says: "Any error in this figure would, I think, be on the upper rather than the lower side." (M.R. p. 213.) Without attempting an exact adjustment of all these values, Wyoming proposes a reduction by the elimination of 3,500 acres at 4.28 acre feet per acre, involving a total supply of 15,000 acre feet.

The requirement for the Pathfinder District, as specified by the Master, wholly ignores a supply from pumps, which the undisputed testimony shows to be 7,640 acre feet. Since this supply is available at the land without distribution system loss of 58 per cent, it is the equivalent of 18,000 acre feet diverted at the headgate.

The Master has allowed only 46,000 acre feet for winter diversions (M.R. pp. 60-61). In accordance with testimony of the United States this allowance should be 73,000 acre feet, or an increase of 27,000 which would serve to reduce the May-September requirement in the latter amount.

Upon these bases, the May-September requirement of the Pathfinder Irrigation District, under the Interstate canal, should be reduced as follows:

	Acre Feet
May-September requirement specified by Master, (419,000 acre feet less 46,000 acre feet of winter diversions)	373,000

Reductions:

3,500 acres at 4.28	15,000	
Supply from pumps	18,000	
Increase in winter diversions	27,000	
Reduction in May-September requirement	60,000	60,000
May-September requirement as revised		313,000

Tri-State Canal

As to the Tri-State canal it is stated at page 243 of the Master's Report, that current demand would appear "liberally represented" by 52,300 acres, and a distribution system loss of 48.5 per cent is adopted which, according to the Master, appears warranted but "ample" (M.R. p. 244), and delivery at the land of 1.8 acre feet per acre is adopted (M.R. p. 244) which, with reference to the Interstate, appears to be on the "liberal side," to use the Master's language (M.R. p. 210). Without proposing an exact adjustment of all the different factors involved, we believe there should be a reduction of the acreage from 52,300 to 49,000, which latter figure is in excess of the average for the years 1933 to 1937, and likewise in excess of any specific acreage figure for any year, excepting possibly 1932. At the prescribed headgate diversion of 3.5 acre feet per acre (M.R. p. 244), elimination of 3,300 acres amounts to 11,500 acre feet.

Northport Canal

For the Northport canal, delivery of 1.8 acre feet per acre at the land is proposed (M.R. p. 232), which the Master states is on the "liberal side" in specifying same for the Interstate (M.R. p. 210). A distribution system loss of 58 per cent is adopted (M.R. p. 232), the same as for the Pathfinder Irrigation District, with reference to which the Master states, if erroneous, it is on the upper rather than on the lower side (M.R. p. 213). At page 59 in the footnote, the Master states that in his opinion interceptions from return flow channels in the future will presumably go to the Northport Irrigation District under decision of United States v. Tilley, 124 Fed. (2d) 850. If this is true the distribution system loss of 58 per cent for the Northport is grossly excessive, as these

interceptions amount to 35,500 acre feet seasonally. (Footnote 2, M.R. p. 59.) This water will not be carried from the headgate of the Tri-State canal, but will be diverted from return flow channels. The reduction in loss will be 30 per cent of the main canal loss on 35,500 acre feet, or 10,600 acre feet.

Summary Whalen Tri-State Dam Requirements

Based upon the matters hereinabove set forth, this Defendant excepts to the findings and conclusions of the Master as to the requirements of the individual canals herein mentioned, and as to the requirement of the Whalen Tri-State Dam Section, and proposes that May-September requirements of the individual canals should be reduced, and as to the Ramshorn eliminated, as follows:

Interstate	60,000 acre feet
Tri-State	11,500 acre feet
Northport	10,600 acre feet
Ramshorn	3,000 acre feet
Total reduction	85,000 acre feet
Master's proposed May-September requirement for the section (M.R. pp. 59-61)	1,027,000 acre feet
Less deductions	85,000 acre feet
May-September requirement for the section as revised	942,000 acre feet

With reference to requirements of the Whalen Tri-State dam section, attention is called to the fact that in Table 5, p. 73 of the Master's Report the seasonal (May-September) requirement of the Pathfinder district of the Interstate canal is given as 419,000 acre feet. This is the annual requirement (M.R. p. 59) and by virtue of winter diversions of 46,000 acre feet, as determined by the Master, the May-September requirement is 373,000 acre feet. (M. R. pp. 59-61.)

At page 163 of the Master's Report, it is stated that the total Wyoming requirement in the Whalen Tri-State dam section is 227,000 acre feet per season. This Defendant excepts to such statement as it is erroneous, since it omits any requirement for the lands in Wyoming of the Pathfinder Irrigation District under

the Interstate canal; it appearing that the total acreage determined by the Master in this District is 98,000, as shown in Table II, page 59, of which 2,300 acres are in Wyoming, as disclosed by Table XVII at page 86. The requirement of 2,300 acres at the diversion rate for the Interstate of 4.28 acre feet per acre is approximately 10,000 acre feet, which added to 227,000 gives a total Wyoming requirement of 237,000 acre feet. Table V, page 73 of the Report fails to list any acreage or requirement for Wyoming upon the Wyoming lands of the Pathfinder District.

WATER SUPPLY AND WATER SUPPLY STUDIES

Because of the errors hereinafter pointed out, and the erroneous findings and conclusions of the Master with reference to water supply and concerning the effect of certain water supply studies, this Defendant makes the following exceptions:

VII

Defendant excepts to the statement at page 22 of the Master's Report that the first Nebraska section of 140 miles from the Wyoming-Nebraska state line to Kingsley Reservoir makes the large contribution of 1,027,890 acre feet annually. The value given is that for the State line to North Platte section, as shown on C-128; North Platte being fifty-five miles down stream from Kingsley Reservoir, as shown at page 36 of the Report. The total Nebraska production, shown on page 22, of 1,336,090 acre feet, however, is the grand total from the sources from which it was taken as to the entire section from the Wyoming-Nebraska line to Grand Island, Nebraska, comprising 1,027,890 acre feet from the state line to North Platte, and 308,200 from North Platte to Grand Island. These values appear on Colorado exhibits 128 and 158.

VIII

Defendant excepts to the conclusions of the Master as to the amounts and percentages of original production in the respective states, as disclosed at page 22 of the Report, for the reason that the value of 1,336,090 acre feet of original production for the State of Nebraska is erroneous, and likewise the percentage based thereon. This total of 1,336,090 acre feet is comprised of 1,027,890 acre feet, of accretions between the Wyoming line and North Platte (C-128), and 308,200 acre feet, of increment between North Platte and Grand Island (C-158). This total

run-off of 1,336,090 acre feet is referred to in the Record and Exhibits as "original production," the term used by the Master, but in fact it is original production only in the sense that it comes to the stream in the sections designated. As stated by the Master at page 33, visible return flows in the section from the Wyoming state line to Bridgeport rose from a negligible quantity in 1911 to approximately 700,000 acre feet in 1927. During the drouth period, 1931 to 1940, when return flows obviously were less than during years of more plentiful supply, the annual average increment between the Nebraska line and Bridgeport was 664,000 acre feet; between Bridgeport and Oshkosh 151,000; and between Oshkosh and North Platte 319,000 (W-148). The evidence discloses that the accretions to the stream from the Wyoming-Nebraska line to Oshkosh are primarily comprised of return flows, so that on the average, 1931 to 1940, 815,000 acre feet of return flow water came back to the stream between the Wyoming-Nebraska line and Oshkosh. This water was not "originally" produced in Nebraska, but in Wyoming and Colorado, and after diversion to the lands in eastern Wyoming and western Nebraska, returned to the stream. Therefore, more than one-half of the 1,336,090 acre feet credited by the Master to Nebraska as "original production" is, in fact, water produced in Wyoming and Colorado. Giving credit to this factor the amount of the supply actually originating in Nebraska from precipitation within the Nebraska area is less than 17 per cent of the total supply instead of 34 per cent as shown in the Report at page 22.

IX

This Defendant excepts to the consideration by the Master primarily of the supply of the drouth decade, 1931 to 1940, as the basis of his conclusions, and as the primary foundation of equitable apportionment, for the reason that the dependable supply is in excess of such as existed during said period, when the run-off at Pathfinder was only 71 per cent of the 1904-1940 average (M.R. p. 40).

X

This Defendant excepts to the giving by the Master of primary consideration to such supply as was available in the 1931-1940 period in the Whalen Tri-State dam section for the satisfaction of requirements of that section, since the supply there available was dependent upon the method of operation of Pathfinder and

Guernsey reservoirs, and in the future will be dependent upon the use and control of the additional Seminoe and Alcova reservoirs. Such consideration of supply eliminates additional supplies that will be available in any future similar period from the use of Seminoe and Alcova reservoirs, and the return flows available from the Kendrick Project.

XI

This Defendant excepts to the consideration of supply of the Whalen Tri-State dam section there available during the 1931-1940 decade, since it leaves out of consideration the preceding years of abundant supply, and the availability of additional supplies in the future during such a period as 1904 to 1940 inclusive; it appearing from the evidence that the conservation of the run-off of years immediately preceding 1931 in the additional Seminoe and Alcova reservoirs, and the use of these supplies during such a drouth period as 1931 to 1940 for irrigation of the Kendrick Project, will make available in the Whalen Tri-State dam section 46,000 acre feet of May-September return flows and 50,000 acre feet of October-April return each year.

XII

At page 53 the average annual net gain of the section Pathfinder Reservoir to Whalen, for the period 1926 to 1940, is given as 83,600 acre feet, and for the 1931-1940 decade 64,200 acre feet, with footnote reference to column 34 of US-271. Computation from column 34 of US-271 shows average, 1926 to 1940, to be 226,600, and of 1931 to 1940, 184,200. Computation from W-173, line 10, designated "Historical Gain Pathfinder to Whalen" for the years 1926 to 1940 discloses annual average of 225,780 acre feet, which is very close to the average for the same period of 226,600 acre feet, as shown by column 34 of US-271. The 1931-1940 average is shown in column 10 on W-173 as 184,500 acre feet, compared with average for the same decade on US-271 of 184,200, as above mentioned. The 1904-1940 annual average as shown by W-173 was 287,000 acre feet.

XIII

At page 65 reference is made to the Wyoming study presented by the Wyoming Exhibits 170 to 176, and it is stated that this study assumes a Whalen-Tri-State Dam seasonal requirement of

950,000 acre feet, as compared with the requirement of 1,027,000 as found in the Master's Report, giving rise to an annual difference of 76,200 acre feet. In the same paragraph it is mentioned that in the Wyoming study an additional depletion of 68,500 feet annually was allowed above Pathfinder, and this is correct. It should also be mentioned that in the Wyoming study a winter release of 10,000 acre feet annually was provided (W-176). The entire May-September demand that was set up in the Wyoming study, comprising 950,000 acre feet, for the Whalen-Tri-State Dam section, 68,500 acre feet for additional depletion above Pathfinder, and 10,000 acre feet of winter release, totals 1,028,500 acre feet, or 1,500 in excess of the Master's requirement of 1,027,000 acre feet, which, as to the Master's report, comprises the entire demand, since new development above Pathfinder is eliminated, and no allowance is found necessary for winter releases. Therefore, the demand imposed by the Master is 1,500 acre feet less than that of the Wyoming study, and the conclusions of the Wyoming study are not disturbed. This Wyoming study, comprised in Wyoming Exhibits 170 to 176, and the testimony relating thereto, discloses that the water production during the years 1904 to 1940 inclusive was sufficient, assuming the construction and use of Seminoe and Alcova reservoirs and the irrigation of the Kendrick project during the entire period, to supply all requirements below Pathfinder, including the Kendrick Project, and a residue of 169,300 acre feet was in the upper reservoirs at the end of September, 1940. As explained above, the conclusions of this study are not disturbed if the May-September requirement of the Master for the Whalen-Tri-State Dam section of 1,027,000 acre feet is substituted for the combined requirements of the Wyoming study of 68,500 acre feet for additional development above Pathfinder, 10,000 acre feet of winter release, and 950,000 acre feet for the Whalen-Tri-State Dam section, totaling 1,028,500 acre feet.

XIV

At pages 65 and 66 of the Master's Report, reference is made to the water supply study presented by the United States, and comprised in U. S. exhibits 267 to 273, and it is stated, at page 66, that this study adopts a seasonal requirement for the North Platte Project and the State Line canals that is 59,000 acre feet per season above that found in this report. The May-September requirement of the Whalen-Tri-State Dam section, which was

used in the United States study, comprised 723,300 acre feet for the North Platte Project (U.S.-267) and 307,700 acre feet for the State Line canals (U.S. 269), and historical diversions of Wyoming Private Canals, including the French, which supplies some land in Nebraska, amounting to an average of 55,000 acre feet. Therefore, the total May-September requirement used in this study was 1,086,000 acre feet, or 59,000 acre feet in excess of that proposed by the Master of 1,027,000 for the Whalen-Tri-State Dam section. Conclusion of the United States study was that all requirements below Pathfinder, including the Kendrick Project, could have been supplied from 1926 to 1940 inclusive, assuming production of water as it occurred historically, and the operation of Seminoe and Alcova reservoirs, with minor shortages in 1939 and 1940. The reduction in May-September demand of 59,000 acre feet, which is the difference between the Master's proposed May-September requirement and that of the United States study, would result in such study showing a complete supply throughout the period, and a surplus in the reservoirs at the end of September, 1940.

XV

At page 142 of the Master's Report, reference is made to a study submitted by Nebraska (N-617) of a hypothetical joint operation of Pathfinder, Seminoe and Alcova reservoirs during the years 1904 to 1940 under present conditions of irrigation, including a Kendrick project of 25,000 acres, and statement is made that there would have been spills in eight years between 1918 and 1930, averaging 180,077 acre feet during the thirteen-year period. This Defendant excepts to consideration of any conclusion derived from this Nebraska study for the reason that the demand in the Whalen-Tri-State Dam section used therein was taken from N-631 and comprised 1,254,504 acre feet for the May-September period, or 227,500 acre feet in excess of the Master's proposed May-September requirement of 1,027,000 acre feet. It is apparent that a reduction in the assumed demand of 227,500 acre feet would have materially increased the spills in the thirteen-year period, 1918 to 1930.

XVI

This Defendant excepts to the conclusion stated in the footnote at page 176 of the Master's Report, to the effect that the river is over-appropriated as to natural flow and pretty well ex-

hausted by storage appropriations, since it is disclosed that by the Wyoming study hereinabove mentioned, which imposed a demand upon the stream slightly in excess of the Master's May-September requirement of the Whalen-Tri-State Dam section of 1,027,000 acre feet, that all demands below Pathfinder, including the Kendrick Project, could have been supplied for the entire period, 1904 to 1940, and in addition there would have been reservoir spills during the period of 9,721,000 acre feet, or an average of 262,500 acre feet annually.

XVII

This Defendant excepts to any finding or conclusion of the Master that there was any deficiency in the water supply in the Whalen-Tri-State Dam section during the 1931-1940 decade which may be contained in his Report and which may be indicated by the following:

(a) "Under such method of operation it would appear that the total supply would have closely approached sufficiency for the section." (M.R. p. 68.)

(b) "The lack of such sufficiency under actual administration since 1931 has plainly appeared." (M.R. p. 117.)

(c) "Should the requirement of the (Kendrick) project be imposed on the natural flow of the river under present conditions, either by direct diversion or by storage of water during the irrigation season, it would no doubt seriously aggravate the deficiencies of supply such as were experienced by the lower canals since 1930 to the corresponding injury of the appropriators supplied by those canals." (M.R. p. 139.)

for the reason that the Report, upon its face, discloses there was an adequate supply of water during the ten-year period and for each May-September season thereof, as is particularly shown by Table III on page 67, wherefrom it appears there was an average annual excess of 31,645 acre feet, and wherefrom it appears that the deficiency in any one year was the direct result of excesses in preceding years and not due to any lack of supply, but to maladministration of the available supply during the ten-year period. With reference thereto this Defendant further states that such excess supplies could have been retained and conserved in Pathfinder reservoir and thereby made available for use in years where deficiencies are disclosed.

SEGREGATION OF NATURAL FLOW AND STORAGE

XVIII

This Defendant excepts to the finding and conclusion of the Master that storage water must be segregated from the natural flow (M.R. p. 33) for purposes of interstate apportionment, and to the finding and conclusion that the pooling of storage and natural flow water for the purpose of a general apportionment is not possible (M.R. p. 117), for the reason that equitable apportionment can be made without such segregation, and in fact can properly be made only upon the basis of treating the entire supply as a common fund, not as between individual canals but as between the litigant states.

This Defendant further excepts to such findings and conclusions because it is shown by the Master's Report that no such segregation can be made, said report stating as follows:

> "Mass allocation for the section of natural flow only would encounter difficulty arising from a *lack of complete evidence as to the volume of natural flow in the section available for distribution when segregated from storage water.*" (M.R. p. 150.)

> "In fact the evidence as to what is the natural flow fund in the section is not definite and complete." (M.R. pp. 162-163.)

The foregoing quotations refer to the Whalen-Tri-State Dam section.

Defendant further excepts to such finding and conclusion of the Master as being inconsistent with the findings and conclusions last hereinabove mentioned, it appearing upon the face of the Master's Report that a segregation of direct flow and storage can not be made, and it further appearing from the undisputed evidence in the case that an accurate segregation of direct flow and storage can not be made, the evidence showing that use of the formula proposed by the Master in making such segregation, U. S. Exhibit 204-A, may result in errors to the extent of 1,000 second feet per day.

XIX

This Defendant excepts to the finding and conclusion of the Master that a formula for the segregation of natural flow and

storage, as shown on U. S. Exhibit 204-A, must be employed unless and until Nebraska, Wyoming and the United States may agree upon a modification thereof, or upon another formula (M.R. pp. 69 and 179), for the reason that the evidence discloses said formula to be erroneous, resulting in errors of as much as 1,000 second feet per day at the state line between Wyoming and Nebraska; for the reason that said formula is inaccurate and known to be so, and for the further reason that its inaccuracy is patent from the face of the Master's Report.

APPORTIONMENT OF STORAGE WATER

XX

This Defendant excepts to the failure of the Master to make an apportionment of storage water between Wyoming and Nebraska, and excepts to the findings and conclusions with reference thereto, which are contained in the Report as follows:

> "Recognizing that storage water must be left for distribution in accordance with the contracts relating thereto, a recommendation will be made for an allocation between Wyoming and Nebraska on the basis of certain proportions of the daily natural flow." (M.R. p. 10.)
>
> "The only water subject to allocation, therefore, is the natural flow." (M.R. p. 69.)
>
> "A further objection to the proposal advanced by Wyoming is that it apportions not only natural flow but also storage water the disposition of which is controlled by contracts and which is therefore not subject to apportionment." (M.R. p. 150.)
>
> "This apportionment assumes that the distribution of storage water is controlled by the various storage contracts and that such water would be delivered in accordance with the terms of those contracts." (M.R. p. 160.)

This Defendant excepts to any and all findings and conclusions in the Master's Report to the effect that storage water is not the subject of equitable apportionment between the states, for the reason that water is stored in Wyoming which is used in both Wyoming and Nebraska and no equitable apportionment of the supply can be made exclusive thereof.

This Defendant further excepts to such findings and conclusions for the reason that the function of the Court in the making or rendition of any affirmative decree in this cause is confined to the making of an equitable apportionment between the states, no more and no less, and such an apportionment cannot be made except that it be a division of the entire supply.

This Defendant further excepts to such findings and conclusions of the Master for the reason that the Master has determined, as disclosed by Table IV, page 71 of the Report, that less than half of the supply available for use in the Whalen-Tri-State Dam section in the 1931-1940 period was natural flow, and a decree purporting to make any distribution, apportionment or division between Wyoming and Nebraska of the supply in this section of the stream, based upon natural flow only, deals with less than half of the water, and cannot comprise or constitute equitable apportionment between the states.

This Defendant further excepts to such findings and conclusions because of the assumption of the Master that storage water has been, or will be administered in accordance with the contracts relating thereto, as all of said contracts are based upon the Reclamation Act of June 17, 1902, 32 Stat. 390, and by virtue of Section 8 thereof, beneficial use is the basis, measure and limit of the right to the use of water, and the evidence discloses—and it is so found by the Master—that beneficial use has not been the basis, measure and limit of the right in the past, it being disclosed by the tables in the Master's Report at pages 76 to 79, inclusive, that in a number of years the Interstate, Fort Laramie, Gering, Tri-State and Northport canals diverted quantities of water largely in excess of the requirements determined by the Master as adequate based upon beneficial use. Performance of these contracts can be enforced and future violations prohibited only by decree of the Court restricting each state to the use of such supplies only as are requisite for beneficial purposes, including in such restrictions storage water as well as natural flow.

XXI

This Defendant further excepts to the failure of the Master to make an apportionment of storage water because such failure and his findings and conclusions with reference thereto, mentioned in the preceding paragraph, are inconsistent with his finding at page 33 of his Report as follows:

"Water impounded in Wyoming must be allocated between that State and Nebraska."

XXII

This Defendant further excepts to the failure of the Master to make an apportionment of storage water, for the reason that such omission is contrary to the principles announced and the decision of this Court in Wyoming v. Colorado, 259 U. S. 419.

JOINT OPERATION OF STORAGE RESERVOIRS

XXIII

This Defendant excepts to the findings and conclusions of the Master adverse to joint operation of the North Platte Project and Kendrick storage facilities and to the pooling of the reservoir supply, such findings appearing at pages 143-145 of his Report, for the reason that the findings and conclusions of the Master are based upon assumptions not supported by the evidence, and in fact are contrary to the evidence which discloses that in the study made by Mr. Dibble, a witness for the United States, only one occasion for borrowing would have occurred in the period, 1926 to 1940, had all reservoirs been in operation, and that on such occasion the first depletion of supply was in Pathfinder, the North Platte Project reservoir, and the borrowing was from the Kendrick Project for the benefit of the North Platte, and the loan repaid before the water was needed by the Kendrick.

This Defendant further objects to such findings and conclusions of the Master for the reason that separate operation of storage facilities in accordance with priorities will prove to be cumbersome and impractical, resulting in the waste of water and consequent loss to water users, while joint operation or the pooling of supplies is the only practical, and the most beneficial method which can be adopted, and will result in better utilization of the supply.

OPERATION OF FACILITIES BY UNITED STATES

XXIV

This Defendant excepts to the finding and conclusion of the Master at page 11 of his Report that unquestioned is the authority of the United States in the operation of the storage and power

plants, works, and facilities pertaining to its Reclamation Projects, as such authority as it may have is subject to whatever limitations or restrictions may be imposed thereon in the making of an equitable apportionment of the water supply between the states of Nebraska and Wyoming, and for the further reason that its storage facilities must be so operated as to permit the passage through same of such natural flow and storage supplies at such times and in such amounts as will be necessary to supply the demands of water users in Wyoming and Nebraska in accordance with the principles of equitable apportionment, and in such manner as will comply with such decree as the Court may enter.

KENDRICK PROJECT

XXV

At pages 142 and 143 of the Master's Report, reference is made to the Wyoming study covering the 45 year period, 1895 to 1939, showing that had the Seminoe and Alcova Reservoirs been in operation during that period there would have been conserved and made available at Pathfinder 200,000 acre feet annually above that which was available under operation of Pathfinder alone. It is further stated that allowing for additional evaporation loss of 40,000 acre feet per year, the net increase in available water would be 160,000 acre feet annually, and since the diversion requirement of the Kendrick Project is 168,000 acre feet, the additional conservation of water would fall 8,000 acre feet per year below the full diversion requirement of Kendrick Project. This defendant excepts to this conclusion since it ignores credit for May-September return flow of 46,000 acre feet. That such return would occur is found by the Master in his Report at page 138. Assuming a complete use of all reservoirs, the net consumptive use of the Kendrick Project for the May-September period is as follows:

Additional reservoir evaporation loss	40,000 acre feet
Headgate diversion	168,000 acre feet
Total	208,000 acre feet
Less May-September return flow	46,000 acre feet
Net Consumptive use	162,000 acre feet

Therefore, the additional conservation of 200,000 acre feet per year during the 1895-1939 period would have supplied net requirement of the Kendrick Project and a surplus of 38,000 acre feet annually. In addition, a winter return flow of 50,000 acre feet would have occurred (M.R. p. 138), which in the future may be captured in Kingsley reservoir and used below that point.

It is stated at page 143 of the Report that the evidence is convincing that with the 1895-1939 average conditions of supply, water can be conserved by Seminoe and Alcova reservoirs sufficient substantially to supply the Kendrick Project and leave a considerable return flow which would represent net seasonal gain to the river below Alcova. As heretofore pointed out in our Exception numbered XIII, a water study comprised in Wyoming exhibits 170 to 176 discloses that the water production, as it historically occurred in 1904 to 1940, was sufficient, assuming the operation of Seminoe and Alcova Reservoirs, and the irrigation of Kendrick Project lands, to supply all requirements of the Whalen-Tri-State Dam section and the Kendrick Project throughout the entire period, and it was explained that the demand against the stream imposed by that study, exclusive of the Kendrick Project, totaled 1,028,500 acre feet, or slightly in excess of the Master's proposed May-September requirement of 1,027,000 acre feet for the Whalen-Tri-State Dam section. We have also pointed out in our Exception numbered XIV that the United States water supply study, comprised in Exhibits 267 to 273, used a May-September demand of Whalen-Tri-State Dam section of 1,086,000 acre feet, or 59,000 acre feet in excess of that proposed by the Master, and that if such excess were eliminated there would have been no shortage, and all requirements, including the Kendrick Project, would have been supplied to and including the year 1940.

Based upon the matters hereinabove in this Exception numbered XXV set forth, this Defendant excepts to the failure of the Master to allocate to Wyoming as part of a May-September supply, 168,000 acre feet for diversion by the Kendrick Project, and further excepts to its treatment as an individual project or canal, without including an allocation therefor in a total allotment of seasonal supply for the State of Wyoming for use of the Kendrick Project and appropriators in Wyoming below Whalen.

RECOMMENDATIONS FOR DECREE

XXVI

This Defendant excepts to paragraph 2 of the recommendations for decree at page 177 of the Master's Report, and urges that, to clarfy same, there be added thereto the following sentence:

> "This is exclusive of Seminoe Reservoir and the Kendrick Project, which are given consideration elsewhere."

XXVII

Paragraphs 3, 4 and 6 of the recommendations for decree (M.R. pp. 177, 178, 179) are inter-related as they deal with storage reservoirs in Wyoming, and the use of water in that section of the stream below Whalen where both natural flow and storage are used, and with the Kendrick Project which is largely dependent upon storage, and because of this inter-relation we deem it appropriate that our Exceptions to these paragraphs be combined. This Defendant's Exceptions thereto are as follows:

1. This Defendant excepts to the failure of the Master to treat equitable apportionment between Wyoming and Nebraska in the Whalen-Tri-State dam section, or as to that section and the Kendrick Project, as an apportionment between states, and excepts to the consideration of such apportionment and its determination as between individual canals and groups of canals in the Whalen-Tri-State Dam section in relation to the storage of water in the reservoirs and in relation to the Kendrick Project.

2. This Defendant further excepts to the recommendations contained in paragraphs numbered 3, 4 and 6 because they are inconsistent with, and contrary to the findings and conclusions of the Master which are contained in his Report as follows:

> 'From a legal standpoint, I doubt the jurisdiction of this Court to fix such limitations upon individual canals." (M.R. p. 160.)
>
> "Consequently, the findings herein as to requirements cannot, I think be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree." (M.R. p. 161.)

3. This Defendant says that an equitable apportionment between Wyoming and Nebraska for the Whalen-Tri-State Dam section, and for that section considered with the Kendrick Project, can be based only upon the relative rights of the two States, and not upon the relative rights of individual canals or groups of canals or the relationship between individual canals or projects, or between such individual canals or projects and the storage reservoirs, and in this connection this defendant says that a proper apportionment can be made only upon the basis of a division of seasonal (May-September) supplies in quantities of acre feet, leaving each State complete freedom in the use of its allotment, and without assuming to fix the right of any individual appropriator, project, or canal in relation to others.

Such an apportionment in quantities of acre feet for the May-September season should be based upon that portion of the May-September requirement of the Whalen-Tri-State Dam section allocated to Wyoming lands and comprising 237,000 acre feet, as hereinabove set forth (Exception VI, last paragraph), plus a diversion requirement of 168,000 acre feet for the Kendrick Project, or a total of 405,000 acre feet. Nebraska's seasonal allotment, if the conclusions of the Master are adopted as to requirements in the Whalen-Tri-State Dam section, should be the difference between 237,000 acre feet and 1,027,000 or 790,000 acre feet; but in that connection, as set forth in our Exception VI supra, the requirement of the Ramshorn should be eliminated, and those of the Interstate, Tri-State and Northport for Nebraska lands reduced, all in the total amount of 85,000 acre feet, leaving the Nebraska allotment 705,000 acre feet. In addition to such May-September allotments, winter diversions of 73,000 acre feet to the inland reservoirs of the Interstate canal should be permitted.

Shortages, if any occur, should be sustained by the States in proportion to the respective allotments, or upon such other equitable basis as may be adopted by the Court.

As to the May-September period, each State should be limited to its seasonal allotment, and surplus supplies in any year should be held up-stream in Pathfinder, Seminoe and Alcova reservoirs.

4. This Defendant excepts to the failure of the Master to recommend a mass allocation of supply between Wyoming and

Nebraska as to the Whalen-Tri-State Dam section, and the Kendrick Project, for the reason that his failure so to do is contrary to the principles announced by this Court and its decisions in Wyoming v. Colorado, 259 U. S. 419; 286 U. S. 494; 298 U. S. 573; 309 U. S. 572.

5. Further objecting to said paragraphs 3, 4 and 6, this Defendant excepts to the failure thereof to make any apportionment of storage water between the states of Wyoming and Nebraska, and in this respect said recommendations are contrary to, and inconsistant with the findings of the Master at page 33 of his Report, to-wit:

> "Water impounded in Wyoming must be allocated between that State and Nebraska."

With reference to the failure to allocate storage water, attention is directed to our Exception numbered XX hereof, wherein it is pointed out that over half of the water in the Whalen-Tri-State Dam section is storage, and to the statement of the Master (Page 141 of his Report) that the Kendrick is primarily a storage project, and this Defendant excepts to the failure of the Master to make an apportionment of the storage supply which comprises more than one-half of the water subject to apportionment.

6. This Defendant further excepts to the failure of the Master to make an allocation of storage water, because his recommendations in that connection are contrary to the principles announced and the decision of this Court in Wyoming v. Colorado, 259 U. S. 419.

7. Wyoming further excepts to the Recommendations in said paragraphs 3, 4 and 6, and particularly with reference to paragraph 6, for the reason that a segregation of natural flow and storage is recommended, which is contrary to, and inconsistent with the findings and conclusions of the Master that such segregation can not be made, (See Exception XVIII supra, where such findings and conclusions are quoted), and for the reason that natural flow and storage can not be accurately segregated, and attempted segregation thereof must inevitably result in injustice to the litigant States because of its inaccuracy.

8. This Defendant further excepts, particularly with reference to paragraph 6 of the recommendations, because of the rec-

ommended adoption of United States Exhibit 204-A, for use in segregation of the natural flow and storage water in the Whalen-Tri-State Dam section, since the evidence discloses said formula to be incomplete and inacurate, and its use will result in errors of as much as 1,000 second feet per day. (See Exceptions XVIII and XIX supra.)

9. Wyoming excepts to the recommendations of said paragraphs 3, 4 and 6 because adoption thereof will prevent joint operation of storage reservoirs and the pooling of reservoir supplies.

10. With respect to the individual requirements of the Farmers Irrigation District and the Ramshorn Irrigation District, set forth in paragraph 3 of the Recommendations for Decree, this Defendant excepts to the inclusion of the Ramshorn, for the reasons heretofore stated in our exception VI, and, as to the Tri-State, excepts to the seasonal limitation of 183,050 acre feet and the second foot limitation of 748, and says that they should be reduced respectively to 171,500 and 700; it being the position of Wyoming, however, that such canals or any others should not be treated as individual projects or canals in any Decree that may be entered. Wyoming further says that unless the Court finds that the interceptions of 35,500 acre feet in the future must be delivered to the Northport canal, the specified requirement of the Farmers Irrigation District should be reduced an additional 35,500 acre feet, with a corresponding reduction in the second foot limitation.

11. With reference to the recommendations of the Master, as to the Whalen-Tri-State Dam section, and the Kendrick Project, this Defendant excepts to his primary consideration as the basis thereof of the water supply of only the 1931-1940 decade; his failure to consider the long-term supply; his failure to determine what is a dependable supply, and his failure to consider as a dependable supply that which was produced during the period 1895 to 1940, and the amount which in any similar period of run-off in the future will be useable by virtue of operation of the presently existing reservoirs, and the irrigation of the lands of the Kendrick Project.

12. This Defendant further excepts to the recommendations of the Master in paragraphs 3, 4 and 6, because of his failure to give consideration to the toleration of permissible shortages in

the Whalen-Tri-State Dam section, such shortages being of common occurrence in most irrigation projects.

XXVIII

As to paragraph 5 of the recommendations for decree, Wyoming does not object to an injunction against diversions above Alcova in lieu of Kendrick return flow, but does except to any restriction upon use of Kendrick return flow by appropriators below Alcova, for the reason that said return flow will become a part of the natural flow of the stream subject to diversion and use by Wyoming appropriators, as well as by those of Nebraska, and for the further reason that Wyoming's use from the main stream between Alcova and Guernsey will be limited by the provisions of paragraph 2, and for the further reason that any apportionment of the supply in the Whalen-Tri-State Dam section must include all natural flow there available, and must inevitably include Kendrick return flow.

XXIX

Wyoming excepts to the provisions of paragraph 8 of the recommendations for decree, and urges the Court to make and enter such decree herein as will be a complete equitable apportionment between the litigant States, leaving open for future consideration only the question of additional development above Whalen in Wyoming and Colorado. Further in connection with the recommendations of paragraph 8, Wyoming proposes that no application for modification should be permitted within a period of less than five years, and preferably ten years, from entry of decree herein.

XXX

Wyoming urges that the recommendation of the Master as to the ues of water for domestic and other purposes contained at page 180, should be clarified and rewritten as follows:

> "The parties are agreed that there should be no restriction upon the diversion from the North Platte River and tributaries in Colorado or Wyoming of water for ordinary, and usual domestic, municipal and stock-watering purposes and nothing in the decree is intended to, or will interfere with such diversions and uses."

XXXI

Wyoming excepts to the conclusion of the Master at page 180 of his Report that his recommendations are not inter-dependent, and that one or more might be adopted without the others, and in this connection this Defendant says that restrictions should not be imposed upon Wyoming without correlative limitations upon Colorado and Nebraska, and that a complete equitable apportionment between the three States can be made only by limiting the uses in all three jurisdictions.

XXXII

Wyoming excepts to the recommendations for decree because of their failure to impose upon the State of Nebraska limitations similar in scope and effect to those recommended for Wyoming and Colorado.

MIS-STATEMENTS

XXXIII

This Defendant excepts to certain mis-statements contained in the Master's Report as follows:

1. At pages 15 and 115 it is stated that in Wyoming appropriations are limited to one second foot for each 70 acres irrigated. Such limitation exists or may be applied only in times of shortage, the applicable statutory provision relative therto being found in Chapter 105, Session Laws of Wyoming, 1935, as follows:

> "* * * provided, that no allotment for the direct use of the natural unstored flow of any stream shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made, and provided, further, where there may be in any stream water in excess of the total amount of all appropriations from said stream, such excess shall be divided among the appropriators therefrom in proportion to the acreage covered by their respective permits, and provided, also, that such additional water shall be beneficially used."

2. At page 23 annual flow at Pathfinder for 1933 is given as 1,140,500 acre feet, and should be 1,149,500 as shown by the Engineers Stipulation.

3. At page 68 reference in the footnote to C-180, should be W-180.

4. In Table V, page 73, under the heading "Nebraska" in the right-hand column, which is captioned "Seasonal Requirement, Acre Feet", the value of 419,000 appears in the line "Pathfinder District (Interstate Canal)". 419,000 acre feet is not the "seasonal" requirement as determined by the Master for the Pathfinder Irrigation District, but is the annual requirement. Thereof 46,000 acre feet, according to the Master's determination, is to be supplied by winter diversions, leaving the seasonal, or May-September requirement 373,000 acre feet.

5. In Table V, page 73, under the heading "Nebraska" acreage of the Pathfinder District is given as 98,000 and requirement 419,000 acre feet. 2,300 acres in this District are in Wyoming, and the Nebraska acreage should be reduced in that amount, and the Nebraska requirement reduced 10,000 acre feet to cover this Wyoming acreage. (See Table XVII, page 86, showing 2,300 acres in this District in Wyoming.)

6. At page 117 a seasonal limitation proposed by Wyoming of 1,120,400 acre feet is compared with a requirement found by the Master of 1,275,000 acre feet. These values are not comparable, since the latter includes 46,000 acre feet of winter diversions. (See Master's Report, pp. 59-61.)

7. Total Wyoming requirement in the Whalen-Tri-State Dam section, at page 163, is given as 227,000 acre feet per season, and should be 237,000 since it omits a supply of 10,000 acre feet for 2,300 acres of land under the Pathfinder Irrigation District in Wyoming.

8. In the tabulation on page 178, requirement of the French canal should be 2,737 acre feet as is shown in Table VI on page 74, instead of 2,227.

9. At page 206 it is stated there are in the Pathfinder District in Wyoming about 2,700 or 2,800 acres of Wyoming land, with footnote reference to the Record, Page 14,999, and this is correct, the exact acreage being 2,648.7 acres, as shown at page 15,471 of the Record, and the statement at page 204 that the Pathfinder appropriation includes 33.56 second feet for 2,349 acres in Wyoming is erroneous, although taken from N-622.

10. At page 233 the diversion rate of the Northport Irrigation District is given as 2.6 acre feet per acre, instead of 4.2 as determined at page 232.

11. At page 243 the length of the Interstate main canal is given as 175 miles, and length of main canal and laterals as 1,626 miles, while these values should be, respectively 135 and 810 miles. (See Record pp. 27,451 and 29,266.)

12. At page 267, it is stated that a diversion of 160,000 acre feet is adequate for the Kendrick Project, which is erroneous since at page 138, the requirement is determined to be 168,000 acre feet.

Respectfully submitted,

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November 16th, 1944.